A **YEONG OON KONG & ANOR**

v.

LEE CHU MING & ORS

B HIGH COURT MALAYA, IPOH
SU GEOK YIAM J
[CIVIL SUIT NO: 22-11-2000]
12 NOVEMBER 2010

C ***CONTRACT:*** *Sale and purchase of property - Failure to complete - Buyer failed to pay balance purchase price as contracted - Whether buyer repudiated contract and seller accepted repudiation - Whether seller's agreement to sell property to new buyers valid - Whether first buyer lost caveatable interest on property - Whether new buyers entitled to remove*
D *first buyer's caveat and obtain specific performance*

LAND LAW: *Caveats - Caveatable interest - Earlier SPA no longer valid and subsisting upon execution of new SPA - Whether first buyer entitled to enter caveat - Whether first buyer had caveatable interest in property*
E

The first defendant ('Lee') agreed to sell his house ('the property'), which had been vacant for about five years, to the plaintiffs for RM90,000. After signing a sale and purchase agreement ('the first SPA') and related transfer documents and paying Lee a deposit of
F RM1,000, the plaintiffs, with Lee's consent, entered into possession of the property. The balance RM89,000 was to be paid within three months, with another month's extension if necessary, from the date of the first SPA or upon release of the loan by the plaintiffs' financier. At the time of the execution of the
G first SPA the parties were unaware that Lee owed RM101,811.21 on a government loan he had taken to purchase the property. As he was unable to raise the extra amount required to redeem the property, the parties agreed by a supplementary agreement ('P5') to postpone the completion date of the first SPA to such time as
H when the balance on Lee's loan was reduced to RM89,000 through monthly deductions from his salary after which the plaintiffs would pay the balance purchase price to Lee within three months of him redeeming the property. Nothing further happened until about six years later when the plaintiffs received a letter
I ('15 October 1997 letter') from their solicitors (the second defendant) informing them that the balance of Lee's loan had

come down to RM86,666.16. The letter, copied to Lee, was sent by a new partner in the firm who, because he had no knowledge of the existence of P5, erroneously stated that the first SPA had lapsed and had to be revalidated. Lee demanded that the plaintiffs should pay rent for the period they had occupied the property but the plaintiffs, in refusing to do so, vacated the property without returning the house keys to Lee and after dismantling from the property their electrical and other fittings. The plaintiffs did not at any material time settle the balance purchase price for the property. Lee later entered into a sale and purchase agreement ('the second SPA') with the third to the seventh defendants ('the new buyers') to sell the property to them for RM113,000. The new buyers paid Lee RM33,900 as deposit and initial payment, entered a private caveat on the property and moved into the premises. A few days later, the plaintiffs lodged a private caveat on the property to frustrate the completion of the sale in favour of the new buyers. The plaintiffs then filed the instant suit claiming for specific performance of the first SPA and/or damages, interest and costs against Lee. They later added the second defendant as a party and claimed damages against the firm for issuing the 15 October 1997 letter which, they alleged, caused Lee to change his mind and refuse to complete the first SPA. The third to the seventh defendants intervened in the proceedings and prayed for the plaintiff's caveat to be removed and for specific performance of the second SPA and damages against the plaintiffs. Lee counterclaimed against the plaintiffs for arrears of rental for the eight years they had occupied the property at a rate to be assessed by the court and for removal of the plaintiff's caveat and for damages. The second defendant counterclaimed against the plaintiffs for wrongly being made a party to the suit and contended the plaintiff's claim against them not only did not disclose any proper cause of action but was also time-barred.

Held (dismissing the plaintiffs' claims and Lee's claim for rental, granting the new buyers specific performance of the second SPA, ordering the plaintiffs' caveat to be removed, and allowing Lee's, the second defendant's and the new buyers' counterclaim for damages against the plaintiffs):

(1) The first SPA had lapsed and was no longer valid and subsisting as the plaintiffs failed to pay the balance purchase price on or before 15 February 1998 *ie*, three months plus one month after 15 October 1997 letter. (para 87)

(2) The balance purchase price was more than sufficient to pay the balance of Lee's loan as it stood on 15 October 1997. The plaintiffs were contractually bound to pay the balance purchase price to the second defendant to enable the property to be redeemed and the transfer to be registered. (para 84)

(3) In failing to pay the balance purchase price after receiving the 15 October 1997 letter, the plaintiffs had repudiated their contract with Lee and Lee accepted that repudiation and rescinded the contract. Lee was legally entitled to sell the property to the new buyers. The second SPA was valid and binding. (paras 111 & 113)

(4) The plaintiffs' conduct in vacating the property showed there was never any oral agreement between the parties for the plaintiffs to pay rent to occupy the property before completion of the first SPA. If there was such an agreement, there would have been a provision for payment of rent in the first SPA and in P5. (paras 93 & 94)

(5) At the time the new buyers executed the second SPA with Lee, the first SPA was no longer valid and subsisting. The plaintiffs no longer had any caveatable interest in the property and were legally not entitled to enter the caveat. (paras 119 & 121)

(6) The plaintiffs failed to prove their claim against the second defendant. The claim was, in any event, statute-barred. The second defendant had proved that the suit against them was filed in bad faith and maliciously with the intention or motive of damaging their business without reasonable or proper cause. (para 179)

Case(s) referred to:

Bank of Tokyo Ltd v. Mohd Zaini Arshad (Maria Pragasam, Intervenor) [1990] 1 LNS 100 HC ***(refd)***

Butler v. Fairclough (1917) 23 CLR 78 ***(refd)***

Chin Cheng Hong v. Hameed & Ors [1954] 1 LNS 7 HC ***(refd)***

Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd [1998] AC 1 ***(refd)***

Crosbie-Hill v. Sayer [1908] 1 Ch 866 ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Haroon Guriaman v. Nik Mah Nik Mat & Another [1951] 1 LNS 24 HC

Johnson v. Agnew [1979] 1 All ER 883 ***(refd)***

Lamare v. Dixon (1873) LR 6 HL 414 ***(refd)***
Loo Choo Teng & Anor v. Cheok Swee Lee & Ors [2000] 2 CLJ 389 CA ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(dist)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC ***(dist)***
Ng Kheng Yeow v. Chiah Ah Foo & Ors [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 SC ***(dist)***
Oxford v. Provand (1868) LR 2 PC 135 ***(refd)***
Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal The Hannah Blumenthal [1983] 1 AC 854 ***(refd)***
Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***
Tan Suan Sim v. Chang Fook Shen [1980] 1 LNS 75 FC ***(refd)***
Vallipuram Sivaguru v. Palaniappa Chetty [1936] 1 LNS 70 PC ***(refd)***
Wilson v. Northampthon and Banburry Junction Rly Co (1874) LR 9 Ch App 279 ***(refd)***
Zeno Ltd v. Prefabricated Construction Company (Malaya) Ltd & Anor [1967] 1 LNS 221 HC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6, 9
National Land Code, s. 323(1)(a)
Rules of the High Court 1980, O. 15 r. 6, O. 16 r. 8, O. 18 r. 19(1), O. 37, O. 92 r. 4
Specific Relief Act 1950, ss. 11(2), 21(1), 23(b)

For the plaintiffs - Thevin Chandran (Zaireen with him); M/s Thevin Chandran & Wong
For the 2nd defendant - EP Seeralasittan; M/s Chong & Poh
For the 1st defendant - Kerpal Singh; M/s Jagjit Kerpal & Sakthi
For the 3rd-7th defendants - Nathan Subramaniam Eliatamby; M/s WY Chan & Roy

Reported by Ashok Kumar

JUDGMENT

Su Geok Yiam J:

[1] This is a suit filed by the 1st and 2nd plaintiffs on 13 January 2000 against the 1st defendant, initially, claiming for specific performance of a sale and purchase agreement dated 5 August 1991 (the 1st "SPA") of a single storey terrace house

(corner lot) erected on a piece of land held under HS(D)KA 2451/75 Lot 70390 Mukim Ulu Kinta and bearing the address No. 1, Regat Tasek Jaya, 31400 Ipoh, Perak (the "property").

[2] Subsequently, the plaintiffs added the legal firm of Messrs Leong & Leong as the 2nd defendant.

[3] Subsequently, the 3rd defendant to the 7th defendants applied to intervene and were also added as parties to the proceedings.

[4] The 1st and 2nd plaintiffs are husband and wife.

[5] The 1st defendant is the registered owner of the property.

[6] The 2nd defendant had acted as the conveyancing solicitors for the plaintiffs in respect of the 1st SPA.

[7] The 3rd to the 7th defendants are the new purchasers of the property. The 3rd defendant is the father and the 4th to the 7th defendants are his sons.

Facts and Background

[8] The facts and background of the plaintiffs' claim against the 1st to the 7th defendants and the counter-claims of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants against the plaintiffs are, briefly, as follows:

[9] On 5 August 1991, the 1st defendant entered into the 1st SPA, P1, to sell the property to the plaintiffs for a sum of RM90,000 (the "purchase price"). The plaintiffs paid a nominal sum of RM1,000 as deposit to the 1st defendant upon the execution of the 1st SPA instead of the normal 10% of the purchase price. It was agreed that the plaintiffs will pay the balance of the purchase price of RM89,000 to the 1st defendant within three months of the date of the agreement or if the plaintiffs are desirous of obtaining a loan from a bank or a financial institution (the "financier") upon the release of the loan by the plaintiffs' financier to the plaintiffs' solicitors (the "completion period"). The 1st SPA also provided for an extension of one month for the completion of the agreement in the event the plaintiffs are unable to pay the balance of the purchase price within the completion period.

[10] The 1st SPA and the transfer form, Form 14A in the National Land Code (the "NLC"), were duly executed by the plaintiffs and the 1st defendant at the office of Messrs Leong & Khoo, the solicitors for the plaintiffs.

[11] The 1st defendant had made it known to the 1st plaintiff and also the conveyancing solicitor concerned, the late Mr Khoo Chin Seong ("Mr Khoo") who was a partner of Messrs Leong & Khoo, that he had bought the property with the aid of a government housing loan (the "loan"). At the time the parties executed the 1st SPA, the plaintiffs and their solicitors did not know what was the balance of the loan outstanding. The 1st defendant was under the impression that the balance of the loan outstanding was RM90,000.

[12] The 1st plaintiff had indicated to the 1st defendant that he wished to occupy the property forthwith. As the property had been vacant for about 5 (five) years prior to the execution of the 1st SPA, the 1st defendant allowed the plaintiffs to occupy the property before the completion of the 1st SPA (the "interim period"). So in the month of August 1991 after executing the 1st SPA, the plaintiffs moved into the property. The plaintiffs claimed that they had repaired and renovated the property before moving into the property upon getting the consent of the 1st defendant. This is disputed by the 1st defendant.

[13] On 6 September 1991, the 2nd defendant wrote to the Housing Loans Division of the Malaysian Treasury (the "Housing Loans Division") to enquire as to the amount of loan which the 1st defendant still owed the government. In the meantime, the plaintiffs were successful in securing a loan of RM75,000 from their financier *vide* their financier's letter dated 16 September 1991, P2. The plaintiffs were also able to come up with the differential sum of RM14,000. So the plaintiffs were able and willing to complete the 1st SPA by paying to the 1st defendant the balance of the purchase price of RM89,000. However, on 18 October 1991, the Housing Loans Division wrote and informed the 2nd defendant that the amount of loan outstanding as at the end of March 1992 was RM101,811.21.

[14] But the 1st defendant was in no position to hand over vacant possession of the property to the plaintiffs even if the plaintiffs were to pay the balance of the purchase price to the 1st

defendant because the 1st defendant was unable to raise the differential sum of RM11,811.21 in order to redeem the property. So in order to prevent the 1st SPA from lapsing or coming to an end as the plaintiffs were still keen to purchase the property, the 1st plaintiff agreed to postpone the completion period until such time as the balance of the loan was reduced through monthly deductions from the 1st defendant's salary to a sum of RM89,000 in order to correspond to the amount of the balance of the purchase price of RM89,000.

[15] The plaintiffs claimed that they verbally consented to the extension of the completion period in the manner as set out above, in consideration of the oral promise given to them by the 1st defendant in October 1991 to allow them to continue to occupy the property without having to pay any rental to the 1st defendant. This is disputed by the 1st defendant. According to the 1st defendant there was an oral agreement between him and the 1st plaintiff that he will allow the plaintiffs to continue to occupy the property subject to the 1st plaintiff paying a reasonable amount as rental during the interim period and that the amount of rental payable will be discussed and resolved at the time of the completion of the 1st SPA.

[16] Subsequently, a supplementary agreement to provide for the extension of the completion period of the 1st SPA until such time as the balance of the loan was reduced through monthly deductions from the 1st defendant's salary to a sum of RM89,000 in order to correspond to the amount of the balance of the purchase price of RM89,000 whereupon the plaintiffs will pay to the 1st defendant the balance of the purchase price within 3 (three) months from the date the 1st defendant has redeemed the property (the "new completion period"), was duly drafted by the late Mr Khoo and executed by the parties on 22 September 1992, P5 ie, some 1 (one) year and 1 (one) month after the plaintiffs and the 1st defendant executed the 1st SPA.

[17] On 15 February 1996, the late Mr Khoo passed away. This led to the change in the name of the legal firm of Messrs Leong & Khoo to Messrs Leong & Leong, the 2nd defendant.

[18] In 1997, which was some (six) 6 years after the execution of the 1st SPA, the 1st defendant received a carbon copy of a letter dated 15 October 1997, D(D2)9 (the "letter"), from the

2nd defendant. The letter was written by Dr Leong Wai Man ("Dr Leong"), the solicitor who took over the long-standing matter from his previous partner, the late Mr Khoo. The plaintiffs also received the letter. The letter was addressed to the plaintiffs. The letter referred to a letter from the Housing Loans Division dated 1 October 1997 which stated that the balance of the 1st defendant's loan was RM86,666.16. The letter advised the plaintiffs that the balance of the 1st defendant's loan was RM86,666.16 which fell below the purchase price of RM90,000. Unfortunately for Dr Leong, his legal assistant, Miss Kamala Mahlini a/p Jeganathan ("Miss Kamala"), who was assigned to deal with the matter had omitted to direct his attention to the existence of the supplementary agreement, P5, before he issued out the letter. According to Dr Leong, he was briefed on the matter by Miss Kamala who told him that the 1st SPA had long lapsed.

[19] The omission on the part of and the statement made by Miss Kamala had caused Dr Leong to erroneously state in the letter that the 1st SPA "has long lapsed" and had to be "revalidated". The reason is because as was stated earlier, the 1st SPA had been kept operative and subsisting through the mechanism contained in the supplementary agreement, P5 which had been specifically entered into by the plaintiffs and the 1st defendant for that purpose. There was, therefore, no lapse of the 1st SPA and no revalidation of the 1st SPA was required.

[20] According to the 1st plaintiff, the 1st defendant then informed him that he was no longer interested to sell the property to him. The 1st defendant also demanded that the plaintiffs pay rental for the interim period. The plaintiffs refused. So on 31 December 1997, which is slightly over 6 (six) years since the 1st SPA was executed by the plaintiffs and the 1st defendant, the plaintiffs moved out of the property which they had been occupying for that period on the ground that the 1st defendant wanted to charge them rental for the interim period and had demanded for payment of rental for the interim period. According to the plaintiffs they had forgotten about the supplementary agreement, P5 because they were not given a copy of it by the 2nd defendant and did not pay the balance of the purchase price amounting to RM89,000 to their solicitors, the 2nd defendant, as stakeholders to enable the conveyancing solicitors to redeem the

title, discharge the charge, and present the transfer for registration because the 1st defendant had told the 1st plaintiff that he did not want to sell the property to the plaintiffs anymore. The plaintiffs also did not return the house keys to the 1st defendant because they were still keen to purchase the property, they had electrical and other fittings in the property and they wanted to persuade the 1st defendant to allow them to purchase the property. This is disputed by the 1st defendant.

[21] The plaintiffs then engaged new solicitors to act for them. On 23 January 1998 the 1st defendant's current solicitors wrote to the plaintiffs' current solicitors to state, *inter alia*, that had the plaintiffs taken the bank loan (in September 1991) and paid the balance of the purchase price of RM89,000 to the 2nd defendant, the plaintiffs would have been paying interest at 8% which would come to about RM590 per month, that it was, therefore, fair and reasonable that the plaintiffs pay the sum of RM590 per month from date of occupation to the date the title is registered in the plaintiffs' names, that the amount of the loan outstanding was in the region of RM86,000 which was less than the purchase price and that the plaintiffs' current solicitors "may proceed to discharge the charge whereupon we shall get our client to execute a valid and registrable transfer form for registration". The letter ended with the following request:

> May we have your response on a note of urgency, please.

[22] It is noteworthy that the letter did not expressly require the plaintiffs to pay the amount of RM590 per month as a condition precedent to the plaintiffs' current solicitors discharging the charge and the execution by the 1st defendant of a valid and registrable form for registration.

[23] Thereafter, there were negotiations between the 1st plaintiff and the 1st defendant concerning the amount of rental which the 1st defendant wanted to charge the plaintiffs for the period of the plaintiffs' occupation of the property but these negotiations which ultimately broke down and failed were conducted through "without prejudice" correspondences between their current solicitors. After 30 April 1998, the 1st defendant did not receive any more correspondence from the plaintiffs. It is significant that the plaintiffs did not pay, at all material times, the balance of the purchase price amounting to RM89,000 to their new solicitors as stakeholders in

order to enable them to discharge the charge so that the plaintiffs can complete the purchase of the property. According to the plaintiffs, they did not do that because the 1st defendant had informed the 1st plaintiff that he did not want to hand over vacant possession to the plaintiffs should the plaintiffs refuse to pay to him rental for the duration of their occupation of the property. This is disputed by the 1st defendant.

[24] In September 1999, the plaintiffs found out that the 1st defendant had sold the property to a new purchaser. So the plaintiffs removed their electrical and other fittings from the property.

[25] On 22 September 1999, which is some (8) eight years after the execution of the 1st SPA and some 1 (one) year 9 (nine) months after the plaintiffs had moved out of the said property, without handing back the keys to the 1st defendant, the 1st defendant entered into another sale and purchase agreement D(D3) 17, (the "2nd SPA") to sell the same property to the 3rd, 4th, 5th, 6th and 7th defendants for a sum of RM113,000 (the "new purchase price"). The 2nd SPA, the transfer form, Form 14A in the NLC and all other related documents were duly executed by the 1st defendant and the 3rd, 4th, 5th, 6th and 7th defendants at the office of another legal firm, namely, Messrs Adliza Subra & Partners, a firm of solicitors acting for the 1st defendant. The 3rd defendant paid a sum of RM11,300 as deposit to the 1st defendant. The sum represents 10% of the new purchase price. Subsequently they paid another sum of RM22,600 to the 1st defendant. With the permission of the 1st defendant the 3rd to the 7th defendants moved into the property.

[26] On 25 September 1999, which is only three days after the execution of the 2nd SPA, the 3rd, 4th, 5th, 6th and 7th defendants entered a private caveat on the title to the property (the "1st caveat") to protect their interest under the 2nd SPA.

[27] On the same day, the plaintiffs tried to remove the awning which they had caused to be erected on the property but they were prevented from doing so by the police who were called to the property by the 3rd defendant on the ground that he had purchased the property which included the awning being a fixture to the property.

[28] On 29 September 1999, which is slightly more than eight years after the execution of the 1st SPA and four days after the 1st caveat was lodged by the 3rd to the 7th defendants, the plaintiffs lodged a private caveat on the title to the property (the "2nd caveat"). As a result of this the 3rd to the 7th defendants did not pay the balance of the new purchase price to their current solicitors as stakeholders because the 2nd SPA could not be completed by the 1st defendant as the transfer of the property in favour of the 3rd to the 7th defendants could not be registered.

[29] On 13 January 2000, which is three and a half months after the plaintiffs lodged their caveat, the plaintiffs' current solicitors commenced these proceedings against the 1st defendant *vide* a writ of summons together with a statement of claim, encl. (1), claiming for specific performance, and/or damages, interest, costs and any other order as the court deems fit for breach of the 1st SPA.

Events After The Filing Of The Plaintiffs' Writ

[30] On 3 March 2000 the 1st defendant applied unsuccessfully *vide* encl. (3) to strike out the plaintiffs' suit before the learned senior assistant registrar. He had relied on the grounds that it is frivolous, vexatious and an abuse of the process of court, pursuant to O. 18 r. 19(1) and/or O. 92 r. 4 of the Rules of the High Court 1980.

[31] On 19 September 2000, the 1st defendant filed his statement of defence and counter-claim dated 15 September 2000, encl. (16), against the plaintiffs. The 1st defendant denied that the property needed repairs before it could be occupied by the plaintiffs. The 1st defendant has also relied on an oral agreement between the plaintiffs and the 1st defendant to suspend the completion period in the 1st SPA upon the parties learning that the balance of the 1st defendant's loan stood at RM101,811.21 which exceeded the balance of the purchase price of RM89,000 until such time as the two amounts equalised. It was also orally agreed between the parties that the plaintiffs were allowed to continue to occupy the property and in the meantime the plaintiffs were to pay a reasonable rental for the duration of the occupation by them.

[32] The 1st defendant has further relied on the defence of estoppel by conduct against the plaintiffs on the ground that the conduct of the plaintiffs in quietly removing his household belongings and vacating the property on 31 December 1997, and also dismantling and removing the electrical and other fittings including the drain covers in September 1999 from the property without informing the 1st defendant or handing over the house keys to the 1st defendant, in informing the 3rd defendant that he, the 1st plaintiff, was no longer interested to purchase the property and in not communicating with the 1st defendant after 30 April 1998 had caused the 1st defendant to believe that the plaintiffs were no longer interested to complete the 1st SPA. As a result of that the 1st defendant has altered his position based on that belief by selling the property to a new purchaser and thus the plaintiffs could not go back to their original position. The 1st defendant counter-claimed for a sum to be assessed by this Honourable Court as arrears of rental for the property which was occupied by the plaintiffs from August 1991 to August 1999, an order that the plaintiffs' caveat be removed, damages for wrongful entry of caveat, interest at 8% per annum on the sum awarded as rental from 1 August 1991 to date of realisation, costs and any other relief as this Honourable Court deems fit and necessary.

[33] On 28 September 2000, the plaintiffs filed their statement of defence, encl. (17), against the 1st defendant's statement of defence and counter-claim. The plaintiffs denied the 1st defendant's averments and maintained that they are at all material times still interested to purchase the property and that they only vacated the property because the 1st defendant wanted to charge them rental for their occupation of the property during the interim period. They denied that they agreed orally to pay reasonable rental to the 1st defendant for their occupation of the property during the interim period.

[34] On 29 September 2000, the plaintiffs applied for summons for directions for the filing of a list of documents and an affidavit verifying the list of documents by both parties. The learned SAR gave the directions which were duly complied with by the parties.

[35] On 7 March 2001, the full trial commenced.

[36] On 21 March 2001, the plaintiffs applied *vide* their summons-in-chambers, encl. (34), together with a certificate of urgency, encl. (36), as the full trial was adjourned to 9 and 10 May 2001 for continuation of hearing, for leave to amend their statement of claim in order to add a new para. 10 to plead the existence of the supplementary agreement, P5 and to plead in the renumbered para. 14 that there was also no provision for payment of rental by the plaintiffs in the supplementary agreement, P5.

[37] In their affidavit-in-support of their application affirmed by the 1st plaintiff, the plaintiffs said they had forgotten about the supplementary agreement, P5, because they were not given a copy of it by their solicitors and that they only remembered its' existence when their solicitors subpoenaed Miss Kamala as a witness for the trial and the supplementary agreement, P5 was discovered upon conducting a file search.

[38] On 10 April 2001, the court granted the plaintiffs order-in-terms of their application.

[39] Subsequently, on 18 April 2001, the plaintiffs filed their amended writ of summons and statement of claim, encl. (37) which contained the new para. 10 and the renumbered and amended para. 14.

[40] On 9 May 2001, the 1st defendant filed the amended statement of defence and counter-claim, to add a new paragraph, to admit para. 10 of the plaintiffs' amended statement of claim, encl. (38).

[41] On the same day ie, 9 May 2001, the full trial continued and the plaintiffs closed their case after calling three witnesses, namely PW1, the 1st plaintiff, PW2, the 2nd plaintiff and PW3, Miss Kamala.

[42] On 17 July 2001, the 1st defendant's case commenced and continued on the morning of the 18 July 2001 but in the afternoon of that date the court had to postpone it to 15 to 17 January 2002 because of the conduct of Mr Kerpal Singh, learned counsel for the 1st defendant, in persistently raising the same issue on which the court had already ruled ie, the issue concerning whether the "without prejudice" communications, between the current solicitors of the parties regarding the amount of rental for the duration of the plaintiffs' occupation of the

property during the interim period, are admissible in evidence, either by way of documentary evidence or oral evidence, at the trial. On 7 March 2001 when the full trial commenced and when the 1st plaintiff was cross-examined by Mr Kerpal who wanted to refer the 1st plaintiff to a letter marked "without prejudice", Mr Thevin had objected on the ground that all correspondences between the two solicitors were made on a "without prejudice" basis, that he had made the same objection before the learned senior assistant registrar, that his objection was allowed and that Mr Kerpal did not appeal against that decision. I had allowed Mr Thevin's objection. Subsequent to my ruling Mr Kerpal had raised the same issue again for no less than four times. The court found the conduct of Mr Kerpal Singh, learned counsel for the 1st defendant, tedious and also an obstruction of the process of justice as the trial could not proceed smoothly.

[43] Mr Kerpal then wrote a long letter of complaint to James Foong Cheng Yuen, J the then senior judge of the Ipoh High Court (as His Lordship then was) and demanded that I should recuse myself from continuing to hear the case on the ground that I was biased against him and that his client will not get a fair trial because I had taken contempt proceedings against him when I was the Senior Sessions Court Judge, Ipoh in a running down matter. His Lordship then showed to me the letter of complaint and asked me whether I was agreeable to recuse myself. I informed His Lordship that I was not agreeable to recuse myself because the complaint was baseless. So His Lordship forwarded the letter of complaint to the Right Honourable Chief Judge of Malaya at that time for his direction. Upon perusing the notes of evidence the Right Honourable Chief Judge of Malaya was satisfied that the complaint was indeed baseless and I was directed to continue to hear the case.

[44] On 1 June 2002 I was transferred to the Penang High Court. On 3 September 2003, the 3rd to the 7th defendants applied *vide* a summons-in-chambers, encl. (52), pursuant to O. 15 r. 6 of the Rules of the High Court 1980 to intervene in these proceedings on the ground that they have entered into the 2nd SPA with the 1st defendant but they could not complete the 2nd SPA because of the dispute between the plaintiffs and the 1st defendant, the plaintiffs have wrongfully lodged their caveat on the title to the property and they are seeking for the cancellation of the plaintiffs' caveat.

[45] On 14 May 2005, I dismissed their application with costs on the grounds that firstly they had delayed in applying to intervene in these proceedings at the earliest opportunity despite having the knowledge and opportunity to do so because the plaintiffs have already closed their case and the 1st defendant has opened his case. Secondly they have other remedies such as filing a separate suit against the 1st defendant and the plaintiffs. In fact they have already filed another proceeding against them ie, OS No: 24-661-04 which is pending hearing before Zainal Adzam J for an order that the plaintiffs' caveat be removed.

[46] I also refused their oral application to stay the proceedings until the hearing of their appeal to the Court of Appeal.

[47] On 8 August 2005, the Court of Appeal granted a stay of the proceedings pending the hearing of the appeal by the 3rd to the 7th defendants to intervene in these proceedings.

[48] On 26 September 2005, the plaintiffs applied *vide* a summons in chambers, encl. (78), for leave to add the 2nd defendant as a party to the proceedings and to amend the writ of summons and statement of claim, accordingly.

[49] On 16 June 2006, the court heard the application after both learned counsels for the plaintiffs and the 1st defendant submitted that the application was not caught by the stay order of the Court of Appeal. The court then granted the plaintiffs leave to add the 2nd defendant as a party to the proceedings and also adjourned the full trial *sine die* pending the decision of the Court of Appeal in respect of the appeal by the proposed intervenors.

[50] So on 4 July 2006, the plaintiffs filed a re-amended writ of summons and statement of claim, encl. (86), to add the 2nd defendant, the firm of solicitors who had handled the 1st SPA for the plaintiffs. The plaintiffs are claiming damages, interest and costs against the 2nd defendant on the ground that the 2nd defendant's letter had caused the 1st defendant to change his mind and to refuse to complete the first SPA thereby preventing the plaintiffs from purchasing and owning the property.

[51] On 4 September 2006, the 2nd defendant filed a statement of defence and counter claim, encl. (91). In their statement of defence and counter claim the 2nd defendant avers in the main

that the entire statement of claim of the plaintiffs discloses no proper cause of action against the 2nd defendant and that the plaintiffs had misused the process of law against the 2nd defendant. Further or in the alternative, the 2nd defendant avers that the plaintiffs' claims against the 2nd defendant arose in 1998 and is time-barred by virtue of s. 6 of the Limitation Act 1953. The 2nd defendant has also counter claimed for damages, interest, costs and such further order or relief as the court deems fit and just from the plaintiffs for being wrongly made a party.

[52] On 27 September 2006, the plaintiffs filed their reply and defence to the 2nd defendant's statement of defence and counter-claim, encl. (92). The plaintiffs have denied the 2nd defendant's averments. According to the plaintiffs' averments, pursuant to s. 9 of the Limitation Act 1953 the limitation period is 12 years because the plaintiffs' claim is for recovery of land and alternatively, the six years limitation period under s. 6 of the Limitation Act 1953 only begins to run from April 2001 when the supplementary agreement, P5, was tendered to the court in the course of the trial.

[53] On 2 January 2007, I was transferred to the Shah Alam High Court.

[54] On 18 September 2007, the Court of Appeal allowed the appeal of the proposed intervenors, the 3rd to the 7th defendants, and granted them leave to intervene in these proceedings.

[55] On 9 October 2009, the 3rd to the 7th defendants filed their statement of defence and counter claim, encl. (95), to the plaintiffs' statement of claim. They aver that their caveat has priority over the plaintiffs' caveat because when they entered into the 2nd SPA with the 1st defendant they had no knowledge of the plaintiffs' claim to the property. They have given notice to the plaintiffs to have their caveat removed. They pray that the plaintiffs' claim be dismissed. They also counter-claimed for a declaration that their interest under their caveat has priority over the plaintiffs' caveat and that they are entitled to be registered as the registered owners of the property, an order that the plaintiffs' caveat be removed, that the plaintiffs do pay to them damages to be assessed by the deputy register pursuant to O. 37 of the Rules of the High Court 1980, costs and any other relief which this Honourable Court deems fit.

[56] On the same date ie, on 9 October 2009, they also filed their notice and statement of claim against the 1st defendant pursuant to O. 16 r. 8 of the Rules of the High Court 1980, encl. (96). They are claiming for specific performance of the 2nd SPA and damages to be assessed by the deputy registrar pursuant to O. 37 of the Rules of the High Court 1980, costs, and any other relief deemed fit by this Honourable Court. They rely on the grounds that they had no knowledge of the plaintiffs' claim to the property before they executed the 2nd SPA and that they have lodged a caveat on 25 September 1999 to protect their interest under the 2nd SPA and also given notice to the plaintiffs to remove their caveat and that they are at all times ready, able and willing to complete the purchase of the property.

[57] On 14 October 2009, the plaintiffs filed their reply and defence to the defence and counter claim of the 3rd to the 7th defendants, encl. (98). The plaintiffs denied that the 3rd to the 7th defendants did not have prior knowledge of the plaintiffs' claim because the 1st plaintiff had informed the 3rd defendant at a chance meeting in September 1999 of the plaintiffs' claim under the 1st SPA. The plaintiffs also averred that they are not liable to the 3rd to the 7th defendants in respect of their counter claim in respect of the plaintiffs' caveat.

[58] On 27 October 2009, the 1st defendant filed his defence to the statement of claim of the 3rd to the 7th defendants, encl. (105). The 1st defendant averred that the 3rd to the 7th defendants are entitled to have the property transferred to them but are not entitled to their counter-claim for specific performance and/or damages because they knew that the plaintiffs have wrongfully lodged their caveat as the 1st plaintiff had already told the 3rd defendant that he was no longer interested to purchase the property.

The Case For The Plaintiffs

[59] This is the case for the plaintiffs as submitted by learned counsel for the plaintiffs. The 1st SPA has not lapsed at the time the letter, D(D2)9 was issued on 31 October 1997 because there was the supplementary agreement, P5, which sets out the mechanism to extend the completion period of the 1st SPA.

[60] The 2nd defendant was negligent and they also breached their contractual duty to the plaintiffs in issuing the letter, D(D2)9 to the plaintiffs with a copy to the 1st defendant. The letter gave the opportunity to the 1st defendant to abandon the 1st SPA and to enter into the 2nd SPA to sell the property to the 3rd to the 7th defendants.

[61] The plaintiffs were allowed to move into and occupy the property rent-free. The plaintiffs categorically deny that they have agreed in principle to pay rental at a reasonable sum to be agreed upon between them and the 1st defendant upon the completion of the 1st SPA. The reason why the plaintiffs vacated the property is because the 1st defendant wanted to charge them rental for their occupation of the property and not because they have abandoned their intention to purchase the property.

[62] The plaintiffs say the 3rd to the 7th defendants are not legally entitled to specific performance of the 2nd SPA because the 1st SPA is still valid and subsisting by virtue of the supplementary agreement, P5.

The Case For The 1st Defendant

[63] This is the case for the 1st defendant as submitted by his learned counsel. The plaintiffs have abandoned their intention to purchase the property and thus have unilaterally rescinded the 1st SPA by failing to pay the balance of the purchase price of RM89,000 to their solicitors so that they could take the necessary steps to complete the 1st SPA which was extended by the supplementary agreement, P5 and also by vacating the property and dismantling and removing all their electrical and other fittings including the drain covers from the property in September 1999 although they have not handed back to the 1st defendant the keys to the property.

[64] The 1st defendant allowed the plaintiffs to occupy the property subject to the payment of reasonable rental for the interim period. However, the 1st defendant did not specify the amount of the rental to be paid by the 1st plaintiff. The 1st plaintiff then proposed to the 1st defendant that this matter could be discussed and resolved at the time of the completion of the 1st SPA. The 1st plaintiff has been unreasonable in refusing to come to an agreement as to the amount of the monthly rental to be paid by the plaintiffs to the 1st defendant for the occupation of

A the property during the interim period. The 1st defendant further seeks the order of this court to order the plaintiffs to pay a reasonable sum as rental for the period from August 1991 to August 1999 to be assessed by the learned SAR.

B **[65]** In respect of the claim by the 3rd to the 7th defendants the 1st defendant says that although they are entitled to have the property transferred to them he is not liable to them in any way because they were aware of the plaintiffs' claim under the 1st SPA.

C

The Case For The 2nd Defendant

[66] The 2nd defendant's case as submitted by their learned counsel is as follows:

D **[67]** The 2nd defendant has not done anything wrong and the suit was filed by the plaintiffs in bad faith. The reasons are because although the letter, D(D2)9, has erroneously stated that the 1st SPA had long lapsed and had to be revalidated, the letter was sent by AR registered post to the plaintiffs and a copy was E also sent to the 1st defendant. The letter stated clearly that after two weeks from the date of the letter, should the parties fail or neglect to come and see the 2nd defendant to have the 1st SPA revalidated, the 2nd defendant shall treat the matter as closed. Thereafter, neither the plaintiffs nor the 1st defendant went back F to see the 2nd defendant so the 2nd defendant considered the matter as closed.

[68] Furthermore, the 2nd defendant was only added as a party after the plaintiffs had closed their case against the 1st defendant and after the limitation period of six years in respect of a claim G for damages had expired irrespective of whether the period commences from 5 August 1991 or 15 October 1997.

The Case For The 3rd To The 7th Defendants

H **[69]** This is the case for the 3rd to the 7th defendants as was submitted by their learned counsel:

[70] The caveat of the 3rd to the 7th defendants has priority over the plaintiffs' caveat because it was lodged earlier in point of I time and also without knowledge of the plaintiffs' claim under the 1st SPA and that, therefore, the plaintiff's caveat ought to be removed so that they can complete the 2nd SPA as they have

paid to the 1st defendant a sum of RM11,300 being 10% deposit of the new purchase price of RM113,000 and another sum of RM22,600 and are, at all times, ready, able and willing to pay the balance of the new purchase price amounting to RM79,700 to the 1st defendant through their current solicitors as stakeholders so that the transfer can be registered in their favour.

The Trial

[71] In the trial which commenced on 7 March 2001 the plaintiffs called three witnesses. They are the 1st and 2nd plaintiffs as PW1 and PW2, respectively, and Miss Kamala as PW3.

[72] The 1st defendant called two witnesses, namely, himself as DW1 and Ting Kong Kok who is a broker and an unregistered real estate agent as DW2.

[73] The 2nd defendant then called one witness, namely, Dr Leong as DW3. The 2nd defendant did not apply to the court to recall the plaintiffs' third witness, PW3, for purposes of cross-examination.

[74] The 3rd to the 7th defendants called one witness, namely, the 3rd defendant as DW4.

[75] The trial concluded on 10 November 2009. Upon the request of all the parties, the court granted them leave to put in their written submissions by 14 December 2009 and fixed the case for clarification or decision on 17 December 2009. Unfortunately, the date had to be vacated because all the parties could not meet the dateline. I received the 1st defendant's written submissions on 2 December 2009 (and another copy of the same on 22 December 2009), the written submissions of the 3rd to the 7th defendants on 14 December 2009 (and another copy on 15 December 2009), the plaintiffs' written submissions on 15 December (and another copy on 16 December 2009), the 1st defendant's written submission-in-reply to the plaintiffs' submissions on 16 December (and another copy on 17 December 2009), and the 2nd defendant's written submissions on 16 December 2009 (and another copy on 23 December 2009).

[76] On 1 January 2010, I was transferred to the Petaling Jaya High Court.

[77] On 1 November 2010, I was transferred to the Kuala Lumpur High Court.

Issues For The Determination Of The Court

[78] On 5 January 2001, the plaintiffs and the 1st defendant posed the following five agreed issues for the determination of the court:

(1) whether the 1st SPA is still valid and subsisting?

(2) whether the 1st defendant did charge rental for the plaintiffs' occupation of the property during the interim period?

(3) whether the plaintiffs carried out repairs and renovations to the property?

(4) whether at all material times, the plaintiffs were able and willing to complete the 1st SPA and whether the 1st defendant was aware of the plaintiffs' intention to complete the 1st SPA? and

(5) whether the plaintiffs were entitled to enter their caveat on the property?

[79] After the addition of the 2nd defendant and the 3rd to the 7th defendants, there are two additional issues which require the determination of the court.

[80] The two additional issues are as follows:

(1) whether the subsequent unregistered interest of the 3rd, 4th, 5th, 6th and 7th defendants which is protected under their caveat has priority over the earlier right of the plaintiffs which is protected under the plaintiffs' caveat? and

(2) whether the 2nd defendant is liable in damages to the plaintiffs because of their breach of contractual duty to the plaintiffs and also their negligence in issuing out the letter, D (D2)9, to the plaintiffs which caused the 1st defendant to abandon the 1st SPA and to execute the 2nd SPA to sell the property to the 3rd, 4th, 5th, 6th and 7th defendants?

Decision Of The Court

[81] Having considered the evidence and the written submissions of and the authorities cited by all the parties the decision of the court in respect of each of the seven issues as set out above and the reasons for the decision are as follows:

1st Issue – Whether The 1st SPA Is Still Valid And Subsisting?

[82] The evidence shows that but for the oral agreement between the plaintiffs and the 1st defendant in October 1991 to postpone the completion period of the 1st SPA, the 1st SPA would have expired on 5 December 1991 taking into consideration the three months plus one month extension as provided for in the 1st SPA. The oral agreement was subsequently incorporated in a formal agreement dated 22 September 1992 ie, the supplementary agreement, P5. Pursuant to cl. 1 of the supplementary agreement, P5, the contractual duty of the plaintiffs is to pay the balance of the purchase price within three months of the date, the 1st defendant has redeemed the property from the Housing Loans Division.

[83] In order to enable the 2nd defendant to redeem the property from the Housing Loans Division on behalf of the 1st defendant, the plaintiffs have to pay the balance of the purchase price of RM89,000 to the 2nd defendant as stakeholders when the balance of the 1st defendant's loan is reduced to RM89,000. The court is of the considered view that it is the 1st defendant's duty to inform the plaintiffs and the 2nd defendant as and when that happens. After all he is the borrower of the Government housing loan and only he will be in a position to know when that happens. The plaintiffs and the 2nd defendant will not know unless the 2nd defendant is asked by the 1st defendant to write to the Housing Loans Division on his behalf to obtain the redemption statement. The plaintiffs themselves also did not contact the 1st defendant or the 2nd defendant from time to time to find out whether the balance of the 1st defendant's loan has been reduced to RM89,000 in order that the plaintiffs can complete the 1st SPA by paying to the 1st defendant the balance of the purchase price.

[84] Since the supplementary agreement was only executed more than a year after the oral agreement, the court rules that it was executed merely to formalise the oral agreement between the plaintiffs and the 1st defendant, and although the 2nd defendant breached their contractual duty to the plaintiffs and was also negligent in issuing out the letter, D(D2)9, to the plaintiffs and the 1st defendant, the plaintiffs and the 1st defendant cannot shift their duty and responsibility wholly to the 2nd defendant because they knew that the completion period of the 1st SPA was postponed until such time as the balance of the loan corresponds to the balance of the purchase price of RM89,000. So at the very latest when D(D2)9 was issued out to the plaintiffs, the 1st plaintiff ought to remind the 1st defendant and the 2nd defendant of the oral agreement and the supplementary agreement, P5. The plaintiffs have pleaded the oral agreement in their statement of claim filed on 13 January 2000. Since the balance of the purchase price was more than sufficient to pay the balance of the 1st defendant's loan as it stood on 15 October 1997, the plaintiffs were contractually bound to pay the balance of the purchase price to the 2nd defendant to enable the 2nd defendant to redeem the property from the Government and to register the transfer, bearing in mind that initially the 1st SPA could not be completed because the balance of the 1st defendant's loan was more than the purchase price.

[85] The plaintiffs have given several reasons for their failure to do so. Initially they blamed it on the 1st defendant because the 1st defendant wanted to charge them rental for the duration of the period of their occupation of the property. The plaintiffs did not agree to pay the rental which was demanded by the 1st defendant. Subsequently, they blamed it on the 2nd defendant for issuing the letter, D(D2)9, to the 1st defendant which caused the 1st defendant to abandon his intention to complete the 1st SPA as extended by the supplementary agreement, P5.

[86] But the fact remains that the plaintiffs did not pay the balance of the purchase price to the 2nd defendant as stakeholders at all times.

[87] Since the plaintiffs did not pay the balance of the purchase price of RM89,000 to the 2nd defendant before they engaged their current solicitors and also to their current solicitors before or on 15 February 1998 in view of the three months plus one month extension as stated in the 1st SPA which was extended as per their oral agreement and formalized in the supplementary agreement, P5, the court is of the considered view that the 1st SPA has lapsed and is no longer valid and subsisting.

2nd Issue – Whether The 1st Defendant Did Charge Rental For The Plaintiffs' Occupation Of The Property During The Interim Period?

[88] There was some serious dispute on this issue. Nevertheless, having heard and considered the evidence of both the 1st plaintiff and his wife, the 2nd plaintiff, PW2, and the 1st defendant the court believed the 1st plaintiff when he said that the 1st defendant had allowed him to stay in the property without having to pay any rental. The reason is because the circumstances prior to the 1st SPA show that the 1st defendant was clearly desperate to sell the property to the plaintiffs. The property was vacant for five years prior to the 1st SPA. So he must have been very relieved and happy when the 1st plaintiff contacted him to offer to buy his property. This must be the reason why he did not even check with the Housing Loans Division to find out what was the balance of his loan in August 1991. This also explains why the 1st defendant agreed to accept only a sum of RM1,000 as the deposit instead of a sum of RM9,000 which is 10% of the purchase price of RM90,000. It also explains why when the 1st plaintiff said that he wanted to move into the property immediately the 1st defendant readily allowed the plaintiffs to occupy the property without the imposition of any rental because he must have thought that he had nothing to lose. Having heard the testimonies of the witnesses the court accepted the plaintiffs' contention that the plaintiffs had to vacate the property because the 1st defendant wanted to charge the plaintiffs rental for their occupation of the property. Nevertheless the plaintiffs could still have paid the balance of the purchase price to their conveyancing solicitors and thereafter, should the 1st defendant refuse to hand over vacant possession of the property to them, the plaintiffs can instruct their solicitors to institute court proceedings to compel the 1st defendant to do that. Their solicitors would then do all that were necessary for the completion of the 1st SPA.

[89] The court had the opportunity to observe the demeanour of the 1st defendant on Thursday, 22 October 2009 when he was cross-examined by Mr Thevin, learned senior counsel for the plaintiffs, on another case in the Ipoh Sessions Court (the "ISC") involving a loan he had taken from a moneylender and a charge which could not be registered on a landed security given by the 1st defendant to the moneylender because the 1st defendant was holding the land as trustee for one Dr Foo Lock Lam. He was rude, stubborn, aggressive and also evasive in his answers. He raised his voice and informed the court that the question had nothing to do with the instant suit. He explained that the reason was because the ISC case was already over. He asked the court why counsel was asking all the nonsense. The court directed him to answer the question if he knew the answer. The reason is because if there was any objection to the question his learned counsel could raise it but the 1st defendant refused to comply with the court's direction. He said that the other case had been settled. He also wanted to know from the court (in reference to the questions posed to him in cross-examination) why the lawyer must ask all these nonsense.

[90] The court again directed him to answer the question. Whereupon he replied that he could not remember. Subsequently, upon further cross-examination and further resistance on his part and repeated directions from the court to answer the question he finally answered that he did not understand "all these legal terms such as holding on trust" and that he just signed the document and was given the title to the land.

[91] He is a police officer and it is highly unlikely that he would sign any document without first finding out the nature of the document that he is signing and its import.

[92] The court finds that the 1st defendant is not a truthful witness on this issue. The court did not believe his evidence.

[93] The evidence of the plaintiffs show that the moment the 1st defendant wanted to charge the plaintiffs' rental for the plaintiffs' occupation of the property during the interim period, the plaintiffs protested and when the 1st defendant did not heed their protests they vacated the property. The plaintiffs' conduct in vacating the property shows that there was never any oral agreement between the plaintiffs and the 1st defendant for the charging of rental by

the 1st defendant for the plaintiffs' occupation of the property during the interim period. Of course the plaintiffs could remain on the property and fight the matter out in court but they clearly were not prepared to take that risk. That was why when they wanted to remove the awning which they had caused to be erected on the property they lodged a report first presumably to protect themselves from any possible charge of house trespass or house breaking and to state that they are removing it because they fear that they may not be successful in their attempt to purchase the property.

[94] The 1st SPA and the supplementary agreement, P5, also do not provide for the charging of rental by the 1st defendant. If there was such an oral agreement between the plaintiffs and the 1st defendant for the charging of rental by the 1st defendant the 2nd defendant would have inserted a provision to that effect in the 1st SPA and also the supplementary agreement, P5.

[95] The court, therefore, dismisses the 1st defendant's counter-claim against the plaintiffs for rental for the period from August 1991 to August 1999.

3rd Issue – Whether The Plaintiffs Carried Out Repairs And Renovations To The Property?

[96] The 1st plaintiff, PW1, has testified that he had carried out the following repairs and renovations to the house:

(1) painting of the house;

(2) repairs to the plumbing in the house;

(3) repairs to the leaking roof;

(4) repairs to the ceiling;

(5) repairs to the gate and the installation of an awning.

[97] He claimed that he had spent a sum of RM15,000 to RM20,000 to repair and renovate the house. Unfortunately, he did not keep any receipts because he held the belief that he had already purchased the house. So there was no need for him to keep the receipts. The 1st defendant testified that his house needed cleaning but he denied that it required repairs and painting.

[98] The court believed the plaintiffs when they said they had installed an awning on the property because there is evidence that the 1st plaintiff went to the property with some Indonesian workers to try to remove the awning but they were prevented from doing so by a Sikh police officer who was called to the property by the 3rd defendant. Nevertheless, the court rules that the plaintiffs have failed to prove on the balance of probabilities that they have painted the property, and carried out repairs and other renovations to the property, before moving into and occupying the property because the plaintiffs were unable to furnish any photographs and/or quotations, invoices and receipts for payments in respect of the painting, repairs and other renovations done. It is trite law that he who alleges must prove.

4th Issue – Whether At All Material Times, The Plaintiffs Were Able And Willing To Complete The 1st SPA And Whether The 1st Defendant Was Aware Of The Plaintiffs' Intention To Complete The 1st SPA?

[99] The evidence show that from 5 August 1991 to October 1991 to 22 September 1992 the plaintiffs were ready, able and willing to complete the 1st SPA.

[100] However, the evidence also show that from 15 October 1997 right until 13 February 1998 the plaintiffs were not ready, able and willing to complete the 1st SPA because they never paid the balance of the purchase price of RM89,000 to their former solicitors, the 2nd defendant, or their current solicitors to redeem the property. The court believed the 1st defendant when he said that he was not aware of the plaintiffs' intention to complete the 1st SPA. This is so even though the 1st plaintiff has testified that he has made many attempts to persuade the 1st defendant to complete the 1st SPA. The court did not believe his testimony.

[101] The reasons are as follows:

[102] Granted that initially the redemption sum was in excess of the purchase price as specified in the 1st SPA but both parties had subsequently agreed orally and the oral agreement was incorporated in a formal agreement, ie, the supplementary agreement, P5, to complete the 1st SPA upon the 1st defendant continuing to pay for his housing loan by way of monthly deductions from his salary until such time when the redemption

amount reaches a sum below the balance of the purchase price of RM89,000. By agreeing in this manner, time was set at large by both parties.

[103] The court rules that the 1st SPA has not lapsed through efluxion of time because the plaintiffs could not do anything unless and until the 1st defendant had obtained the redemption statement stating that the amount is below the balance of the purchase price.

[104] The court was satisfied that it was the contractual duty of the 1st defendant to ensure that upon the happening of that event, he would notify the plaintiffs and the plaintiffs' solicitors so that the necessary steps could be taken for the 1st SPA to be completed. The 1st defendant admitted in his testimony before the court that he was never in contact with the plaintiffs after signing the 1st SPA and the supplementary agreement, P5. By failing to do this the 1st defendant has clearly breached the 1st SPA. Nevertheless, as late as October 1997 the plaintiffs were told by their own solicitors, the 2nd defendant, that the balance of the loan was RM86,666.16 which was clearly less than the balance of the purchase price of RM89,000. So the plaintiffs still had the opportunity to complete the 1st SPA if they really wanted to. Unfortunately, they were distracted by the 1st defendant's demand that they pay to him rental for the plaintiffs' occupation of the property during the interim period at RM590 a month.

[105] In his testimony before the court, the 1st plaintiff has said that the 1st defendant did not ask him to pay the rental first before he would agree to complete the 1st SPA. In an earlier affidavit sworn by him he said that the 1st defendant had asked him to pay the rental first before he would agree to complete the 1st SPA. The court believed the 1st plaintiff's evidence as contained in his earlier affidavit because his memory and recollection of events would be better at that time. Nevertheless, the plaintiffs never paid the balance of the purchase price to their solicitors as stakeholders to show that they were still desirous to complete the 1st SPA.

[106] The court did not believe the evidence of the 1st plaintiff that he was ready, able and willing to complete the 1st SPA at all material times. If what the 1st plaintiff said was true he would

have promptly instructed his financier to release the loan of RM75,000 to his solicitors with his instructions to pay the monies to the 1st defendant and he himself would have paid the differential sum of RM14,000 to his solicitors together with his instructions to pay the monies to the 1st defendant and thereafter to instruct his solicitors to commence proceedings against the 1st defendant for specific performance of the 1st SPA in the event the 1st defendant refuses to transfer and to hand over vacant possession of the property to him.

[107] The 1st defendant cannot rely on the copy of the letter, D(D2)9, which he received from the 2nd defendant as a defence to the plaintiffs' suit because pursuant to the oral agreement as incorporated in the supplementary agreement, P5, it was the 1st defendant's duty to complete the 1st SPA upon full payment of the balance of the purchase price of RM89,000 by the plaintiffs.

[108] Granted that the plaintiffs only moved out of the property when the 1st defendant renegaded on his initial promise to allow the plaintiffs to move into and occupy the property free of charge until such time when the redemption amount had been reduced to an amount less than RM89,000. But the plaintiffs did nothing to complete the 1st SPA before or on 15 February 1998. It was only on 22 September 1999, which is one year and seven months later that the 1st defendant entered into the 2nd SPA with the 3rd to the 7th defendants.

[109] The court did not believe the evidence of the 1st plaintiff when he said that on 21 September 1999 he took the 1st defendant to the Ministry of Housing to check on the balance of the loan owing to the government. The court is of the considered view that the 1st plaintiff wants to portray to the court that he is in a state of continuous readiness and willingness to perform the contract on his part from the date of the execution of the 1st SPA to the time the 1st defendant executed the 2nd SPA and right until the time of the hearing of his claim by the court. The reason is because the 1st plaintiff already knew when he received the letter dated 15 October 1997 from the 2nd defendant that the balance of the 1st defendant's loan was RM86,666.16 as at 1 October 1997.

[110] Therefore, it was neither necessary nor important for the 1st plaintiff to know what was the sum owing on 21 September 1999 because the 2nd defendant's letter, D(D2)9, which was sent to the 1st plaintiff, some 21 (twenty one) months earlier, was more than sufficient to alert the 1st plaintiff to the following salient matters:

(1) that as on 1 October 1997, the balance of the 1st defendant's loan stood at RM86,666.16 and that it was already less than the balance of the purchase price of RM89,000;

(2) that there was an oral agreement between the plaintiffs and the 1st defendant to postpone the completion date which was formalised in the supplementary agreement, P5, which was not mentioned in the letter and that the long delay in the completion of the 1st SPA was because the 1st defendant's loan was more than the purchase price at the time of the execution of the 1st SPA and the 1st defendant had to pay his housing loan installments until the balance of the loan was less than the purchase price of RM89,000;

(3) that the plaintiffs, if they were still keen to purchase the property, have to pay the sum of RM89,000 to the 1st defendant through their solicitors, the 2nd defendant, as stakeholders;

(4) that the plaintiffs upon paying the balance of the purchase price to the 2nd defendant as stakeholders with instructions to discharge the charge and to pay the differential sum to the 1st defendant, can commence proceedings immediately against the 1st defendant for specific performance of their contract with the 1st defendant, in the event the 1st defendant refuses to transfer the property to the plaintiffs; and

(5) that in the event the 2nd defendant refuses to comply with their instructions, the plaintiffs are prepared to engage new solicitors to act on their behalf in order to enable the plaintiffs to perform their part of the contract with the 1st defendant and to enforce the contract against the 1st defendant.

[111] The court also agrees with the submissions of learned counsel for the 1st defendant that the plaintiffs are now no longer the party entitled to purchase the property. In failing to pay the balance of the purchase price to their solicitors after receiving the

A 2nd defendant's letter, D(D2)9 the plaintiffs can be said to have repudiated their contract with the 1st defendant. The 1st defendant can be said to have accepted the repudiation of the contract by the plaintiffs and has rescinded the contract.

B **[112]** Although the court believed the evidence of the 1st plaintiff that he had removed all his belongings from the property because he was afraid that he might lose his court case against the 1st defendant, the court did not believe him when he said he still had the intention to purchase the house. The reason is because he did C not pay to his solicitors the balance of the purchase price at all material times before the 1st defendant sold the property a second time to the 3rd to the 7th defendants. The court is satisfied that the 1st defendant has successfully established that the plaintiffs violated an essential term of the contract between them and the D 1st defendant, which required performance on their part ie, payment of the balance of the purchase price.

[113] The court rules that the 1st defendant was legally entitled to sell the property to the 3rd, 4th, 5th, 6th, and 7th defendants E and to execute the 2nd SPA on 22 September 1999. The 1st defendant was thus at liberty to make a new contract with the 3rd, 4th, 5th, 6th and 7th defendants to sell the property to them at a higher price because the property must have appreciated in value through the passage of time. The court rules that the 2nd SPA is a valid and binding contract between the 1st defendant F and the 3rd to the 7th defendants for the sale and purchase of the property.

5th Issue – Whether The Plaintiffs Were Entitled To Enter Their Caveat On The Property?

G

The Law

[114] Section 323(1)(a) of the National Land Code (the "NLC") provides that a private caveat may be entered at the instance of "any person or body claiming title to, or any registrable interest H in, any alienated land or any right to such title or interest."

[115] In *Macon Engineers Sdn Bhd v. Goh Hooi Yin* Gill CJ (Malaya) cited the following authorities on p. 54F-I right hand column:

I

In *Butler v. Fairclough* Griffiths CJ said:

> It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings.

The above statement of the law was approved by the Privy Council in *Abigail v. Lapin* in which Lord Wright delivering the judgment of their Lordships said (at page 500) that a caveat may be lodged with the registrar by any person claiming under any unregistered instrument. In *Chin Cheng Hong v. Hameed & Ors.* Buhagiar J said at page 170:

> The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse.

[116] He then went on to hold, *inter alia*, that it would seem abundantly clear from authorities that so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

[117] The court disbelieved the 1st plaintiff when he said that he was still trying to persuade the 1st defendant to allow him to purchase the property. Having vacated the house on 31 December 1997 the plaintiffs did absolutely nothing until about two years later on 29 September 1999 when they lodged their caveat on the title to the property. There was ample evidence that there was complete inaction on the plaintiffs' part to protect their interest under their contract with the 1st defendant before that event.

[118] The court is also satisfied that the 1st defendant has successfully established their defence of estoppel by conduct against the plaintiffs. The plaintiffs are thus estopped from asserting that their contract with the 1st defendant is still valid and subsisting.

[119] In the instant case the evidence show that the plaintiffs no longer have any caveatable interest in the property so they were not legally entitled to enter the caveat on 29 September 1999.

[120] The reasons are as follows:

[121] At the time when the 3rd to the 7th defendants executed the 2nd SPA with the 1st defendant, the contract between the plaintiffs and the 1st defendant was no longer valid and subsisting. The plaintiffs had breached an essential term of the contract relating to the payment of the balance of the purchase price of RM89,000 and, consequently, had repudiated the contract. This was followed by the rescission of the contract by the 1st defendant. Both the plaintiffs and the 1st defendant can also be said to have impliedly abandoned their intention to complete their contract.

The law

[122] Abandonment of a contract by the conduct of the parties to it can come about in two ways. This was explained by Lord Brandon of Oakbrook in *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal The Hannah Blumenthal* [1983] 1 AC 854 at p. 914 A-C as follows:

> The concept of the implied abandonment of a contract as a result of the conduct of the parties to it is well established in law: see *Chitty on Contracts*, 23rd ed. (1968), vol. 1, p. 577, para 1231, and cases there cited. Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case.
>
> The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. *The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it was not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief. The first method involves actual abandonment by both A and B. The second method involves the creation by B of a situation in which he is stopped from asserting, as against A, that he, B, has not abandoned the contract: Pearl Mill Co. Ltd. v. Ivy Tannery Co. Lt [1919] 1 KB 78.* (emphasis added)

[123] At p. 915A-G Lord Diplock added his own somewhat more detailed analysis of the concept of rescission of contract by abandonment as follows:

> I will deal first with abandonment and in doing so, and later in dealing with the obligations assumed by the parties under an arbitration clause in a commercial contract, I shall use the expressions "primary and secondary obligations" under a contract in the sense that I used them in *Photo Production Lt. v. Securicor Transport Ltd.* [1980] AC 827 and in *Brewer Vuikan* itself. Since I shall be dealing with bipartite synallagmatic contracts only, I will leave the adjectives to be understood whenever I speak of "contract."

[124] Abandonment of a contract ("the former contract") which is still executory, ie, one in which at least one primary obligation of one or other of the parties remains unperformed, is effected by the parties entering into a new contract ("the contract of abandonment") by which each party promises the other to release that other party from further performance of any primary obligations on his part under the former contract then remaining unperformed, but without such non-performance giving rise to any substituted secondary obligation under the former contract to pay damages.

[125] It is the latter part of the promise by each party, ie, the release of the other party from all further secondary as well as primary obligations, that distinguishes the legal concept of abandonment of the former contract from the extinction of unperformed primary obligations of both parties under the former contract by fundamental breach of a primary obligation (or breach of condition) by one of them, followed by the election of the party not in breach to put an end to all primary obligations of both parties under the former contract remaining unperformed. Unlike the contract of abandonment this leaves the secondary obligations under the former contract of the party who committed the breach enforceable against him by the other party.

[126] To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of

each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase *consensus ad idem* and the words that I have italicized are essential to the concept of *consensus ad idem*, the lack of which prevents the formation of a binding contract in English law ... At p. 916A-E, His Lordship continued as follows:

> The rule that neither party can rely upon his own failure to communicate accurately to the other party his own real intention by what he wrote or said or did, as negativing the *consensus ad idem*, is an example of a general principle of English law that injurious reliance on what another person did may be a source of legal rights against him. I use the broader expression "injurious reliance" in preference to "estoppel" so as to embrace all circumstances in which A can say to B: "You led me reasonably to believe that you were assuming particular legally enforceable obligations to me," of which promissory or High Trees estoppel [*Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] KB 130] affords another example; whereas "estoppel," in the strict sense of the term, is an exclusionary rule of evidence, though it may operate so as to affect substantive legal rights inter partes.
>
> In the instant case, as in most cases where abandonment of a former contract is relied on, the contract of abandonment of the arbitration agreement is said by the sellers to have been created by the conduct of the parties, consisting of their common inaction, after the buyers' letter of December 12, 1979. Where the inference that a reasonable man would draw from the prolonged failure by the claimant in an arbitration procedure is that the claimant is willing to consent to the abandonment of the agreement to submit the dispute to arbitration and the respondent did in fact draw such inference and by his own inaction thereafter indicated his own consent to its abandonment in similar fashion to the claimant and was so understood by the claimant, the court would be right in treating the arbitration agreement as having been terminated by abandonment. In *Andre et Compagnie S.A. v. Marine Transocean Ltd. (The Splendid Sun)* [1981] Q.B. 694, all three members of the Court of Appeal drew such an inference from the conduct of both parties in the arbitration.

[127] At pp. 923H-924A-G, Lord Brightman explained the concept of abandonment of contract as follows:

> I turn to the alleged abandonment of the arbitration. Although the claimant's delay does not of itself confer any right on the respondent to call a halt to the arbitration, it may lead to an inference that the submission of the dispute to arbitration has been abandoned by mutual agreement and thus prevent the claimant reviving the proceedings. The *Splendid Sun* [1981] QB 694 is an example ... The test in my opinion is not wholly objective ... To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, and that the sellers did assume, that the contract was agreed to be abandoned *sub silentio*. The evidence which is relevant to that inquiry will consist of or include: (1) What the buyers did or omitted to do to the knowledge of the sellers. Excluded from consideration will be the acts of the buyers of which the sellers were ignorant, because those acts will have signaled nothing to the sellers and cannot have founded or fortified any assumption on the part of the sellers. (2) What the sellers did or omitted to do whether or not to the knowledge of the buyers. These facts evidence the state of mind of the sellers, and therefore the validity of the assertion by the sellers that they assumed that the contract was agreed to be abandoned. The state of mind of the buyers is irrelevant to a consideration of what the sellers were entitled to assume. The state of mind of the sellers is vital to a consideration of what the sellers in fact assumed.

[128] In the instant case the 2nd SPA, D(D3)17, is dated 22 September 1999, and the plaintiffs' caveat was entered on 29 September 1999.

[129] The court rules that the conduct of the plaintiffs ie, long period of delay and inactivity on their part, as evinced towards the 1st defendant, has led the 1st defendant to reasonably believe that the plaintiffs have abandoned the contract, even though the plaintiffs say that it was not in fact their intention to do so. Since the 1st defendant has significantly altered his position in reliance on that belief by entering into the 2nd SPA with the 3rd to the 7th defendants and the 3rd defendant did inform the 1st plaintiff that he had signed the 2nd SPA with the 1st defendant, the plaintiffs no longer had the right to enter the 2nd caveat.

[130] Therefore, the court rules that the plaintiffs' caveat ought to be removed. The plaintiffs are liable in damages to the 1st defendant and also to the 3rd to the 7th defendants for having wrongfully caveated the property. The damages are to be assessed by the learned senior assistant registrar.

[131] The court, accordingly, dismisses with costs the plaintiffs' claim against the 3rd to the 7th defendants and allows with costs the counter claim of the 1st defendant and the 3rd to the 7th defendants against the plaintiffs on this issue.

6th Issue – Whether The Subsequent Unregistered Interest Of The 3rd, 4th, 5th, 6th And 7th Defendants Which Is Protected Under Their Caveat Has Priority Over The Earlier Right Of The Plaintiffs Which Is Protected Under The Plaintiffs' Caveat?

The Law

[132] As far as the law is concerned with the priority on the register between the conflicting equities of two sets of caveators under their respective caveats, the Federal Court in the case of *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67 has held that the trial court has to decide whether the subsequent interest of a caveator overrides the earlier right of a caveator because a caveat may be lodged with the registrar by any person claiming under any non-registrable instrument. (See *Butler v. Fairclough* (1917) 23 CLR 78, 79). The reason is because a caveat being in the nature of a statutory injunction, does not itself make a claim or right either better or worse. (See *Chin Cheng Hong v. Hameed & Ors* [1954] 1 LNS 7). The proposition that just because the intervenor had caveated the land in question earlier the priority of the plaintiff should be reduced and be subservient to the equity of the intervenor cannot be accepted on principle and authority (See *Bank of Tokyo Ltd v. Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)* [1990] 1 LNS 100).

[133] In the case of *Zeno Ltd v. Prefabricated Construction Company (Malaya) Ltd & Anor* [1967] 1 LNS 221 the following excerpt by Parker J in *Crosbie-Hill v. Sayer* [1908] 1 Ch 866, 875 was quoted with approval by Raja Azlan Shah J (as His Royal Highness then was) at p. 107 I left hand column to A right hand column:

> In my view the caveat establishes priority and the onus is therefore on the holder of a subsequent equity to show facts which render it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" applies; ...

[134] As stated earlier, in September 1999, which was about 21 (twenty-one) months after the plaintiffs had vacated the property without paying the balance of the purchase price to the 1st defendant and without handing back the keys to the property to the 1st defendant, the 1st defendant asked his friend, DW2, Ting Kong Kok to see if he could help find a buyer. DW2 put up a "for sale" notice on the property. Acting upon the instructions of the 1st defendant who is the legal and registered owner of the property, DW2 also broke the padlock which was used to lock the gate of the property. Upon entering the house he found that it was empty except for a baby's cot. He replaced the broken pad lock with a new padlock.

[135] When Mr Ting Kong Kok was cross-examined by Mr Sittan, learned counsel for the 2nd defendant, he was mumbling and his answers were not audible to the court although he was advised by the court to speak into the microphone in front of him. The court attributed all these to his anxiety and nervousness in having to give evidence in court which is normal for many witnesses. The court found him to be a truthful witness.

[136] The court believed his evidence that he had placed a "for sale" notice (the "notice") at the front gate and on the front door of the property. He has also said that if one were to drive past the property one would certainly be able to see the notice clearly as it was one foot by two feet in size.

[137] Since he had done that the plaintiffs would surely have seen the notice. The 1st plaintiff himself admitted that he often passed by the property. So he could not have missed seeing the notice even though he said in his evidence that he did not see the notice. The court was of the view that the 1st plaintiff was not telling the truth on this matter. So the court disbelieved the 1st plaintiff when he testified that he did not see the notice when he drove past the property.

[138] An interested buyer, the 3rd defendant, DW4, responded to the notice. He went to inspect the property. DW2 let him into the house. He, too, found that the house was empty. The plaintiffs had removed all their personal and household belongings from the property except for a baby's cot. Prior to 22 September 1999, whilst the 3rd defendant, DW4, was inspecting the house, the 1st plaintiff came along and, among other things, told the 3rd

defendant, DW4, that he was no longer interested to buy the property. The 1st plaintiff then dismantled and removed the lamps, fans, switches and drain covers from the property.

[139] The court notes that the 3rd defendant has given conflicting evidence concerning when was the first time he first met the 1st plaintiff. In an earlier affidavit sworn by him on 24 March 2000, encl. (7), in support of the 1st defendant's application filed on 3 March 2000, encl. (3), to strike out the plaintiffs' suit, he said he first met the 1st plaintiff when he was inspecting the property and before he signed the 2nd SPA. The 1st plaintiff told him he had decided not to buy the house because the owner is a difficult person. He also cautioned the 3rd defendant to be careful of the owner and that the 3rd defendant will have problems with the owner. The 1st plaintiff and his men then removed all the bulbs, fans, bath water heater, air conditioner unit, iron-covers over the drain, etc. They also removed an old frame of a baby's cot from one of the rooms and left it outside the house because the 1st plaintiff said he did not require it.

[140] On 25 September 1999, a neighbour informed him that some men had jumped over the fence of the property and were removing the awning. The 3rd defendant rushed over and saw the 1st plaintiff with some men believed to be Indonesians trying to dismantle the awning. The 3rd defendant protested and told the 1st plaintiff that he had already signed the sale and purchase agreement and that the awning was part of the fixture of the house and could not be removed. The 3rd defendant called the police and a Sikh police officer came and on his advice the 1st plaintiff and his men stopped dismantling the awning and went back. But in court he said that he first met the 1st plaintiff on 24 September 1999 which was two days after he had signed the agreement. On that date he was cleaning the house. The 1st plaintiff informed the 3rd defendant that he had entered into a sale and purchase agreement with the 1st defendant.

[141] The court was of the view that in the absence of a good explanation from the 3rd defendant for the two contradictory versions what the 3rd defendant said in his affidavit which he affirmed more than nine years ago is more likely to be true because it was said earlier in point of time when his memory, and, therefore, his recollection of past events would have been better. Apart from this, the court found the 3rd defendant to be a truthful witness.

[142] In this case, since the 1st caveat was lodged by the 3rd to the 7th defendants who are the holders of the subsequent equity the burden of proof is thus on the 3rd to the 7th defendants to show that they have a better equity and that the 2nd caveat was wrongfully lodged by the plaintiffs or lodged without reasonable cause by the plaintiffs. The court is satisfied based on the evidence adduced by the 3rd to the 7th defendants that they acted *bona fide* when they lodged the 1st caveat. Before they executed the 2nd SPA they found the property vacant and the 1st plaintiff had told the 3rd defendant that he was no longer interested to purchase the property. The 3rd to the 7th defendants were motivated by a genuine desire to protect their contractual interest under the 2nd SPA which is a valid agreement. They had paid a sum of RM11,300 being the 10% deposit of the new purchase price. They were also allowed to occupy the property immediately. So they had a caveatable interest in the property and were legally entitled to lodge a caveat after they had executed the 2nd SPA.

[143] Although the 1st plaintiff was at pains to show in an affidavit, which he executed that he was desirous of continuing with the 1st SPA, the court did not believe him. The reasons are because if what the 1st plaintiff said was true, the 1st plaintiff would have paid the balance of the purchase price to their solicitors in accordance with their contract with the 1st defendant. He would also not have informed the 3rd defendant that he was no longer interested to purchase the property. He would not have removed the electrical and light fittings and the drain covers from the property. As a result of his conduct the 3rd defendant honestly believed that the plaintiffs were no longer interested in purchasing the property. Lastly, the 1st plaintiff would not have attempted on 25 September 1999 to remove the awning which he had caused to be installed on the property bearing in mind that he only lodged his caveat on 29 September 1999 ie, four days later. From the evidence adduced by both sets of purchasers, the plaintiffs on the one side and the 3rd to the 7th defendants on the other side, the court is satisfied that the 3rd to the 7th defendants have a better equity because the 3rd to the 7th defendants have established that there are sufficient circumstances which show that the subsequent interest of the 3rd to the 7th defendants ought to override the earlier right of the plaintiffs.

[144] Having scrutinised the evidence produced by both sides the court finds that the 3rd to the 7th defendants knew of the existence of the 1st SPA between the plaintiffs and the 1st defendant before they executed the 2nd SPA, but the 3rd to the 7th defendants honestly believed that the plaintiffs were no longer interested in purchasing the property as this was told to the 3rd defendant by the 1st plaintiff himself before 22 September 1999, which was the date that the 3rd to the 7th defendants executed the 2nd SPA.

[145] There are also no averments in the plaintiffs' statement of claim that the 3rd to the 7th defendants knew that the plaintiffs intended to proceed with the 1st SPA at the time the 3rd to the 7th defendants entered into the 2nd SPA with the 1st defendant. The court disbelieved the 3rd defendant, DW4, that he only met the 1st plaintiff after the 2nd SPA was signed. The court disbelieved the evidence of the 1st plaintiff at p. 26 line 4 of the notes of evidence dated 22 October 2009 as follows: "Yes, I have met the 3rd defendant. He is an old person. I met him after the 1st defendant told me he had entered into a sale and purchase agreement with the 3rd defendant". The reason is because the 1st plaintiff has also testified that he had met the 3rd defendant before 22 September 1999 when he went to the property to remove his belongings after finding out that the house had been broken into. The court is satisfied that the 1st plaintiff had met the 3rd defendant at the property prior to the execution of the 2nd SPA, and that he was clearly negligent in failing to act promptly and expeditiously in protecting his interests under the 1st SPA.

[146] From what has been stated earlier it is clear that the property was put up for sale and even with this knowledge the plaintiffs did not take any steps to protect their equitable interest under the 1st SPA by lodging a caveat on the property. The 1st plaintiff in his evidence has admitted that he no longer resided on the property as from 31 December 1997. There is one factor which can cause the 3rd to the 7th defendants to lose their priority. It is, if at the time of purchasing the property the 3rd to the 7th defendants knew or were aware that the plaintiffs were still occupying the property.

[147] It was held in the case of *Haroon bin Guriaman v. Nik Mah binte Nik Mat & Another* [1951] 1 LNS 24 that apart from the register, and in the absence of any caveat or issue document of title, the only *indicium* of title which can be considered is that of the *de facto* possession of the land. A

[148] The 3rd to the 7th defendants have testified that before making their decision to purchase the property, a search was conducted on the title to the property. The search revealed that there was no claim made by any party which was endorsed on the title to the property. It was held in the case of *Vallipuram Sivaguru v. Palaniappa Chetty* [1936] 1 LNS 70 that a party could lose his priority if he "neglected the most elementary precaution when [he] purchased the property amongst other things the failure to make a search on the title to the property." B C

[149] In the instant case, the plaintiffs only paid a nominal sum of RM1,000 to the 1st defendant under the 1st SPA and although the transfer form was signed by the plaintiffs and the 1st defendant, it was not presented for registration by the 1st defendant in favour of the plaintiffs because the plaintiffs did not pay to the 1st defendant the balance of the purchase price amounting to RM89,000. The 1st defendant has signed another transfer form in favour of the 3rd to the 7th defendants because he regarded the 2nd SPA as the valid and binding sale and purchase agreement, and not the 1st SPA. The 3rd to the 7th defendants who are also now in occupation of the property have paid a total of RM33,900 to the 1st defendant and are ready, able and willing to pay the balance of the new purchase price to the 1st defendant. D E F

[150] The *Macon Engineers Sdn Bhd's* case which was cited by Mr Thevin is distinguishable on facts. In that case the 2nd purchaser applied to remove the caveat lodged by the 1st purchaser on the ground that they had paid the full purchase price and obtained a valid transfer. Nevertheless, the learned High Court Judge held that the plaintiff who was the 1st purchaser had a prior equity to that of the defendants who were the 2nd purchaser, by reason, firstly, of his agreement with the common vendors being very much earlier in time although he had yet to pay the balance of the purchase price as he wanted proof that the vendors were the registered proprietors. Secondly, by reason G H I

of the fact that he had lodged his caveat before the defendants presented their transfer for registration. Thirdly, by reason that he had in fact sued the common vendors for specific performance of his agreement. The learned High Court Judge, therefore, dismissed the defendants' application to remove the plaintiff's caveat on the ground that the caveat must remain to protect the interest of the plaintiff until the suit filed by him against the registered proprietors was finally disposed of.

[151] The case of *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 which was cited by Mr Thevin is also distinguishable from the instant case because in that case there was no dispute on the facts. The 4th respondent paid the balance of the purchase price. The discharge of the charge was duly executed and the title deed was given to the 4th respondent. The Supreme Court affirmed the decision of the learned High Court Judge and held that by paying the full purchase price the 4th respondent who was the first purchaser had become the beneficial owner although he had lodged his caveat after the second purchaser had lodged his caveat. There was, therefore, no caveatable interest against which the second purchaser's caveat could lie.

[152] On appeal, the Federal Court affirmed his decision and dismissed the defendants' appeal. Gill CJ (Malaya) of the Federal Court held that the basic rule at law, as in equity, is that estates and interests primarily rank in the order of creation. He quoted the latin maxim *"Qui prior est tempore potior est jure"* which means "he who is earlier in time is stronger in law."

[153] In the instant case there are serious disputes on the facts. Apart from that the plaintiffs did not pay the balance of the purchase price of RM89,000 to the 1st defendant. The discharge of the charge was not executed. The title to the property was not given to the plaintiffs. The plaintiffs also did not lodge a caveat to protect their right under the 1st SPA until after the 1st SPA had lapsed and was no longer valid and also after the 2nd SPA was executed by the 1st defendant in favour of the 3rd to the 7th defendants and the latter had lodged their caveat on the title to the property. Granted that the 2nd defendant did not take action to lodge the caveat on the plaintiffs' behalf. But the plaintiffs'

current solicitors who came into the picture in January 1998 also did not lodge a caveat on the title to the property on behalf of the plaintiffs.

[154] As far as this court is concerned the letter dated 15 October 1997, D(D2)9 can be said to be a wake up call to the plaintiffs to take the necessary and appropriate measures in respect of the 1st SPA if they still had the intention to purchase the property. They had to pay the balance of the purchase price so that their solicitors can discharge the charge. They had to ask the 2nd defendant why the 1st SPA had long lapsed when they had already entered into an oral agreement and also signed the supplementary agreement, P5, with the 1st defendant to suspend or postpone the completion period of the 1st SPA. From the conduct of the plaintiffs in not writing quickly or within a reasonable time to the 1st defendant either through the 2nd defendant or through his new set of solicitors about the 1st SPA and his intention to pay the balance of the purchase price, to enable his solicitors to discharge the charge so that the 1st defendant's solicitors can present the memorandum of transfer for registration, the 1st defendant cannot be faulted for arriving at his conclusion that the plaintiffs were no longer interested to purchase the property.

[155] Therefore, the court is satisfied that the 3rd to the 7th defendants have a better equity and it would be unjust and inequitable for the plaintiffs to insist that his prior equity, be enforced by the court as against the 3rd to the 7th defendants.

[156] The plaintiffs and the 3rd to the 7th defendants have claimed for specific performance of their respective contracts against the 1st defendant.

The Law

[157] The law governing specific performance in Malaysia is statutorily embodied in the Specific Relief Act 1950. The Act contains elaborate provisions governing the remedy of specific performance. Section 11(2) provides that specific performance may be granted in respect of agreements relating to land transactions where there is a presumption that a breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

[158] Section 21(1) provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The court may exercise a discretion in granting or withholding a decree for specific performance in the exercise of that discretion based on the circumstances of the case, the conduct of the parties and their respective interests under the contract, are to be remembered. (See *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; per Seah FJ. See also *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors* [2000] 2 CLJ 389 per Gopal Sri Ram JCA; *Oxford v. Provand* (1868) LR 2 PC 135 at 151; and *Lamare v. Dixon* (1873) LR 6 HL 414 at 423).

[159] There are well established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity. (See *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297 at 299, HL).

[160] In that case Lord Hoffmann cited the case of *Wilson v. Northampthon and Banburry Junction Rly Co* (1874) LR 9 Ch App 279 at 284 and added as follows:

> which is, as Lord Selborne LC once remarked, to "do more perfect and complete justice" than would be the result of leaving the parties to their remedies at common law. Much therefore depends upon the facts of the particular case.

[161] Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. The principles on which English judges exercise their discretion to grant specific performance are reasonably well settled and depend on a number of considerations, mostly of a practical nature, which are of very general application. (See *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297 at 301, HL, per Lord Hoffmann.)

[162] A party seeking specific performance is required to show to the satisfaction of the court that he is in a continuous state of readiness and willingness to perform the contract. This principle was restated by Seah FJ in *Ganam Rajamany v. Somoo Sinniah* [1984] 1 CLJ 123 (Rep); [1984] 2 CLJ 268 at p. 133, FC, as follows:

> Now, in a suit for specific performance, a party treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit (see the *dictum* of Lord Blanesburgh in *Mama v. Sassoon* [1972 - 28] 55 IA 360, 372-373). Although, so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England it seems invariably to have been recognized, and on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same (see *Karasandas v. Chotalal* 25 ILR Bom 1037, 1050). This principle has been consistently adopted and applied by the courts in this country.

[163] The Indian Specific Relief Act 1877 is in *pari materia* with our Specific Relief Act 1950.

[164] Section 23(b) of the Specific Relief Act 1950 provides that specific performance of a contract cannot be enforced in favour of a person who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed. (See *Tan Suan Sim v. Chang Fook Shen* [1980] 1 LNS 75; [1980] 2 MLJ 66, FC; affirming [1980] 1 MLJ 105).

[165] In granting an order for specific performance, the court may impose such terms as are necessary (See *Loo Choo Teng*'s case). The decree may make provision for ancillary matters such as payment of the purchase price with interest. In *Loo Choo Teng*'s case, Gopal Sri Ram JCA said as follows at p. 400:

> In my view, a Court of Equity is sufficiently empowered to decree specific performance on terms. There are cases where an order decreeing specific performance has made provision for ancillary matters, such as the payment of purchase money with interest

A (see eg, *Cooper v. Morgan* [1909] 1 Ch 261). In such cases, the payment of the purchase price is a term upon which relief is granted. If there is non-compliance, the vendor must surely be at liberty to apply to have the decree vacated. There is also precedent for decreeing specific performance and then leaving it to the defendant to later apply to have the decree vacated on the ground of impossibility of performance.

[166] His Lordship at p. 265C cited as an example *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154, where Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Supreme Court cited *Johnson v. Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, where the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the court.

[167] His Lordship then held that each case must depend on its own facts and that the terms, if any, that may be imposed must *ex necessitae rei* depend on the facts and circumstances of the particular case.

[168] The court is of the considered view that in the instant case the plaintiffs are not entitled to be granted a decree of specific performance which is an equitable remedy because they have come to equity with unclean hands as they were the party who failed to perform their part of the contract by depositing the sum of RM89,000 being the balance of the purchase price with the 2nd defendant or their new solicitors as stakeholders. By virtue of cl. 14 of the 1st SPA, time is of the essence of the contract. By virtue of cl. 6 of the 1st SPA, which deals with the default by the purchaser, in the event of any breach by the purchaser ie, the plaintiffs of any of the provisions of the agreement the vendor ie, the 1st defendant shall be entitled to forfeit the deposit sum ie, RM1,000, as agreed liquidated damages and the vendor ie, the 1st defendant shall at the time of such forfeiture refund to the purchaser, the plaintiffs, the sum, if any, equivalent to the difference between the total aggregate of all part payment of the

total purchase price already paid by the purchaser to the date of such breach less the aforesaid sum and thereafter the agreement shall be null and void and of no further legal effect and neither party shall have any claims against the other and the vendor shall be entitled at its absolute discretion to resell the said property either by public auction or by private contract and at such time and place and subject to such conditions and in such manner as the vendor shall think fit without the necessity of previously tendering or offering to make any sale to the purchaser.

[169] By virtue of cl. 7 of the 1st SPA which deals with the default of the vendor, in the event of any breach by the vendor of any of the provisions of the agreement and/or in the event that the vendor shall fail to complete this transaction for any reason whatsoever the purchaser shall be entitled to the remedy at law for specific performance against the vendor of any term of the agreement.

[170] The plaintiffs have also benefited by having been able to enjoy rent-free occupation of the property for six long years despite having paid only a nominal sum of RM1,000 as deposit for the purchase of the property. It is trite law that he who comes to equity must do equity. So it would not be just and equitable for the court to grant a decree of specific performance in their favour.

[171] After vacating the property it took the plaintiffs about two and a half years to institute their suit against the 1st defendant for specific performance of the 1st SPA. It is further trite law that equity will not assist the indolent.

[172] It is significant that the last letter which was written by the 1st defendant to the plaintiffs is dated 23 January 1998. Thereafter there was no letter from the plaintiffs to the 1st defendant to state that the plaintiffs wanted to perform their part of the contract by paying the balance of the purchase price to the 1st defendant through their solicitors. The 1st defendant also did not write any letter to the plaintiffs to ask the plaintiffs to pay the balance of the purchase price failing which the 1st defendant will sell the property to another purchaser. Therefore, it can reasonably be inferred from the conduct of both the plaintiffs and the 1st defendant that there was an implied agreement between them to abandon their contract.

[173] In the circumstances of this case, the court is satisfied that the plaintiffs have failed to prove on the balance of probabilities that they were at all material times ready, able and willing to complete the 1st SPA read together with their oral agreement as incorporated in the supplementary agreement, P5 and that the 1st defendant was at all material times aware of the plaintiffs' intention to complete the 1st SPA. Therefore, the plaintiffs' claim against the 1st defendant for a decree of specific performance of the 1st SPA has no merits and ought to be dismissed with costs.

[174] Since the 3rd to the 7th defendants are still in occupation of the property and are at all times ready, able and willing to complete the 2nd SPA but for the entry of the 2nd caveat by the plaintiffs the court rules that the 3rd to the 7th defendants are entitled to a decree of specific performance against the 1st defendant. The court, accordingly, grants to them a decree of specific performance of the 2nd SPA by the 1st defendant subject to the following terms:

(1) that the 3rd to the 7th defendants do pay, through their solicitors as stakeholders, to the 1st defendant, through his solicitors as stakeholders, the balance of the new purchase price of RM79,100 within 3 (three) months from the date of this judgment or within a period of 3 (three) months from the date their solicitors receive the redemption statement and undertakings from the Ministry of Finance, whichever date that is earlier with liberty to apply to the court for an extension on reasonable grounds; and

(2) In the event that the 3rd to the 7th defendants fail to comply with the above conditions, the 1st defendant is at liberty to apply to have the decree of specific performance discharged and the contract terminated and to be awarded damages, interest and costs for breach of contract.

7th Issue – Whether The 2nd Defendant Is Liable In Damages To The Plaintiffs Because Of Their Breach Of Contractual Duty To The Plaintiffs And Also Their Negligence In Issuing Out The Letter, D(D2)9, To The Plaintiffs Which Caused The 1st Defendant To Abandon The 1st SPA And To Execute The 2nd SPA To Sell The Property To The 3rd, 4th, 5th, 6th And 7th Defendants?

[175] As stated at the outset of this judgment initially this suit was confined between the plaintiffs and the 1st defendant. The suit has proceeded to trial. Upon closing their case after having

called three witnesses, the plaintiffs applied to this court to bring in the 2nd defendant as a party. Pursuant to an order from this court given on 16 June 2006, the 2nd defendant was added as a party to these proceedings.

[176] The issue is whether they can be sued in this matter.

[177] Having heard and considered the evidence adduced before the court and the submissions of and the authorities cited by learned counsel for the 2nd defendant, the court is of the considered view that the 2nd defendant is not liable in damages to the plaintiffs because of their breach of contractual duty to the plaintiffs and also their negligence in issuing out the letter, D(D2)9 to the plaintiffs which caused the plaintiffs not to complete the 1st SPA and in the process resulted in the 1st defendant selling the property to the 3rd to the 7th defendants and that the suit brought by the plaintiffs against the 2nd defendant ought to fail on the following grounds:

(1) The 1st plaintiff has testified that he did not pay the balance of the purchase price to his solicitors because the clerk informed him that the 1st defendant had stopped the clerk from proceeding with the transfer of the house to him but the 1st plaintiff did not call the clerk concerned to testify. Furthermore, he also did not write any letter to the 2nd defendant to protest against what the clerk had told him;

(2) He then went to see Miss Kamala who informed him that the 1st defendant had an oral agreement with the late Mr Khoo not to process the transfer of the house but when Miss Kamala was called to the witness stand as the plaintiffs' 3rd witness, PW3 by the plaintiffs' learned counsel, she was not asked to confirm this piece of evidence;

(3) The 1st plaintiff has also testified that he had met Miss Kamala at the 2nd defendant's office and she had asked him to see her together with the 1st defendant so that the 1st defendant will agree to sell the property to him but when Miss Kamala was called to the witness stand as the plaintiffs' 3rd witness, PW3, she was not asked by the plaintiffs' learned counsel to verify this evidence of the 1st plaintiff;

(4) The 1st plaintiff also testified that he had asked the 1st defendant to go to see Miss Kamala but he refused. Yet no letter was ever sent to the 1st defendant by the 2nd defendant subsequent to the letter to corroborate the evidence of the 1st plaintiff;

(5) The 1st plaintiff also admitted that he did not take any action after the 1st defendant's refusal to go to see Miss Kamala;

(6) As pleaded by the plaintiffs there is, therefore, no evidence whatsoever to show that the 2nd defendant's letter dated 15 October 1997, D(D2)9, had resulted in the 1st defendant rescinding the 1st SPA with the plaintiffs because the 1st defendant only entered into the 2nd SPA with the 3rd to the 7th defendants slightly more than two years later;

(7) The 1st defendant whilst being cross-examined by learned counsel for the plaintiffs said that after seeing the letter dated 15 October 1997, D(D2)9, from the 2nd defendant, he was still prepared to complete the 1st SPA but it was the plaintiffs who had delayed in the completion of the 1st SPA. As a result of the plaintiffs' long delay, the 1st defendant entered into the 2nd SPA with the 3rd to the 7th defendants;

(8) As for the plaintiffs, prior to amending their statement of claim, neither in their statement of claim which mentions the oral agreement between the plaintiffs and the 1st defendant whereby the plaintiffs were allowed to occupy the property rent-free nor in the witness statement of the 1st plaintiff, made in the form of an affidavit, P6, did the plaintiffs rely on D(D2)9 as the main factor which contributed to the failure on the part of the 1st defendant to complete the 1st SPA. Furthermore, even after closing their case, the plaintiffs never adduced the 2nd defendant's letter, D(D2)9, as part of their evidence to support their claim against the 2nd defendant;

(9) Only after amending their statement of claim about five years later did the plaintiffs raise for the very first time the existence of the 2nd defendant's letter, D(D2)9. The court agreed with the submissions of learned counsel for the 2nd

defendant that this clearly shows that the suit filed by the plaintiffs against the 2nd defendant was not only without merits but was done *mala fide*; A

(10) The 1st plaintiff upon being recalled to the witness stand and whilst under cross-examination by learned counsel for the 2nd defendant said that the 1st defendant was not interested in proceeding with the 1st SPA. Nevertheless, whilst being cross-examined by learned counsel for the 3rd to the 7th defendants, the 1st plaintiff also admitted that there was no letter written by him or by his solicitors to the 1st and 2nd defendants, to demand that they take immediate steps to revalidate the 1st SPA even assuming for a moment that what the plaintiffs said about wanting to complete the 1st SPA was true. Furthermore, the 1st plaintiff and the 1st defendant have admitted whilst under cross-examination that when the 1st SPA was entered into between the parties the 2nd defendant had no knowledge that the redemption sum was higher than the purchase price as stated in the 1st SPA. It was only upon writing to the Housing Loans Division and subsequently receiving the reply from them by way of a letter dated 18 October 1991, that the 2nd defendant came to know that the redemption sum exceeded the purchase price as stated in the 1st SPA; B C D E

(11) The court disbelieved the 1st plaintiff when he claimed that on 21 September 1999, the 1st defendant informed him that he will ask his solicitors to instruct the plaintiffs' solicitors to process the transfer of the house as per the terms of the 1st SPA because the plaintiffs have yet to pay the balance of the purchase price to their solicitors as stakeholders; F G

(12) The court disbelieved the 1st plaintiff when he said that he had never abandoned his intention to purchase the property. The court was satisfied that the conduct of the plaintiffs have caused the 1st defendant to believe that the plaintiffs have abandoned their intention to complete the 1st SPA; H

(13) The court was satisfied that although the 2nd defendant had breached their contractual duty to the plaintiffs and they did not conform to the degree of skill and standard of care expected from them because they did not ask the plaintiffs I

to pay to them the balance of the purchase price in order to enable them to redeem the property from the government in October 1997, the 1st defendant only sold the property to the 3rd to the 7th defendants more than two years after the letter, D(D2)9 was sent to the plaintiffs with a copy extended to the 1st defendant and after the plaintiffs have engaged new solicitors to act for them; and

(14) Finally, the plaintiffs' cause of action is statute barred by virtue of s. 6 of the Limitation Act 1953 because the plaintiffs' claim against the 2nd defendant is for damages only. The six years limitation period commenced from 15 October 1997 when the 2nd defendant's letter, D(D2)9 was issued and had expired on 15 October 2003 whereas the 2nd defendant was only made a party to these proceedings in the year 2006 which is more than two years after the expiry of the six years limitation period. In the case of *Nasri v. Mesah* [1970] 1 LNS 85 the Federal Court held, *inter alia*, that time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement and that a cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

Gill FJ in delivering the judgment of the Federal Court said on p. 34 B-F, right hand column as follows:

> A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in *Read v. Borwn*[7]). In *Reeves v. Butcher*[8] Lindley LJ said:
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> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*[9], decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various event; but it has always been held that the statute runs from the earliest time at which an action could be brought.

> In *Board of Trade v. Cayzer, Irvine & Co.*[10] Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild*[11]). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case[6]). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[178] With respect the case of *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 which was cited by Mr Thevin is distinguishable on facts. In that case the plaintiffs had engaged the defendant, a solicitor, to act for them in the purchase of land from one Hj Hassan for the purchase price of $45,000. The defendant did not make a search at or an enquiry with the collector of land revenue. He admitted that he was not aware of the compulsory acquisition of the land by the government which was duly gazetted. The plaintiffs' land was duly acquired by the government. The plaintiffs were awarded and paid a sum of $14,000 as compensation. The defendant did not rely on the defence of limitation. The learned trial judge held the defendant liable in contract and tort to the plaintiffs and ordered him to pay to the plaintiffs, damages of $31,000 together with interest at 6% per annum for the loss which they had suffered. In that case the plaintiffs themselves did not know that prior to their agreement to purchase the land, it had been subject to compulsory acquisition by the government. In the instant case the plaintiffs knew of the existence of the oral agreement because they themselves entered into the oral agreement with the 1st defendant to postpone the completion period of the 1st SPA and the oral agreement was formalised in the supplementary agreement, P5 ("the contract"). Furthermore the 2nd defendant is relying on the defence of limitation and the court is satisfied that the six years limitation period has already set in.

[179] As the court is satisfied that the plaintiffs have failed to prove their claim against the 2nd defendant on the balance of probabilities, the court, accordingly, dismisses the plaintiffs' claim against the 2nd defendant with costs. In respect of the 2nd defendant's counter-claim against the plaintiffs, the court is satisfied that the 2nd defendant has shown on the balance of probabilities that the suit was filed by the plaintiffs in bad faith and maliciously with the intention and/ or motive of damaging the 2nd defendant's business without any reasonable or proper cause. Therefore, the court allows the 2nd defendant's counterclaim with costs with a date to be fixed for assessment of damages before the learned senior assistant registrar.

Conclusion

[180] In the premises the court dismisses the plaintiffs' claim for specific performance of the 1st SPA and/or damages and interest against the 1st defendant with costs, and allows with costs the counterclaim of the 1st defendant other than the counterclaim for the charging of rental for the period of the plaintiffs' occupation of the property from August 1991 to August 1999 ie, for an order for the removal of the 2nd caveat and damages. The court also dismisses with costs the 1st defendant's counterclaim against the plaintiffs for the charging of rental for the period of the plaintiffs' occupation of the property from August 1991 to August 1999. The court also dismisses the plaintiffs' claim for damages and interest against the 2nd defendant with costs. The court also allows with costs the counterclaim of the 2nd defendant against the plaintiffs for damages and interest. The court also allows with costs the counterclaim of the 3rd to the 7th defendants for a declaration that the unregistered interest of the 3rd to the 7th defendants has priority over the plaintiffs' unregistered interest, a declaration that the 3rd to the 7th defendants are entitled to be registered as the proprietors on the title of the property and an order for the removal of the 2nd caveat and damages against the plaintiffs. The court further allows with costs the 3rd to the 7th defendants' claim against the 1st defendant for a decree of specific performance of the 2nd SPA for the transfer of the ownership of the property to them and damages subject to the following conditions:

(1) that the 3rd to the 7th defendants do pay, through their solicitors as stakeholders, to the 1st defendant, through his solicitors as stakeholders, the balance of the new purchase price of RM79,100 within 3 (three) months from the date of this judgment or within a period of 3 (three) months from the date their solicitors receive the redemption statement and undertakings from the Ministry of Finance, whichever date that is earlier with liberty to apply to the court for an extension on reasonable grounds; and

(2) in the event that the 3rd to the 7th defendants fail to comply with the above conditions, the 1st defendant is at liberty to apply to have the decree of specific performance discharged and the contract terminated and to be awarded damages, interest and costs for breach of contract.

[181] Finally, the court orders that damages are to be assessed by the learned senior assistant registrar together with interest at 8% per annum from the date of the filing of their counterclaim against the plaintiffs.